SUPREME COURT, U. S.
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No. 151

In the Supreme Court of the United States

OCTOBER TERM, 1961

LOCAL 164, INTERNATIONAL BROTHERHOOD of PAINTERS, DECORATORS, and PAPERHANGERS of AMERICA, AFL-CIO, ET AL., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):
Section 8(b)(3) 4
Section 8(d) 4

MISCELLANEOUS:

Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057 (1958) 7
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OPINIONS BELOW

The opinion of the court of appeals (Pet. 11-21) is not yet reported. The decision and order of the National Labor Relations Board (R. 8-27)[1] are reported at 126 NLRB 997.

JURISDICTION

The court of appeals entered its judgment on April 27, 1961, and its decree on June 13, 1961. The petition for certiorari was filed on June 15, 1961. The juris-

[1] "R." refers to the joint appendix filed in the court of appeals.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a labor organization violates its obligation to bargain under Section 8(b)(3) and 8(d) of the National Labor Relations Act by insisting that it will not enter into a contract covering wages, hours, and other terms and conditions of employment unless the employer agrees to post a performance bond which would be forfeited to the union in the event the employer violated the contract.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, appear at pp. 2-3 of the Petition.

STATEMENT

A. The Stipulated Facts[2]

Petitioner Local 164 was the bargaining representative of the painters employed by A. D. Cheatham Painting Company at Jacksonville, Florida. A two-year collective agreement was due to expire May 31, 1959, and in the two weeks preceding its expiration the parties met in four bargaining sessions in an effort to negotiate a new agreement.

Acting at these sessions as spokesman for Local 164 and upon instructions from the petitioner International, petitioner Johns submitted to the Company a proposed contract containing two clauses which were not included in the contract proposals which Local 164

[2] The following statement is a paraphrase of the stipulated facts set forth at R. 1-7.

had submitted at the same time to other contractors in the area within its jurisdiction. These clauses provided as follows:

> Section 12: As a protection against possible violations of the terms or conditions of this collective agreement, the undersigned agrees to post a bond of $5,000, which bond will be forfeited and paid to the Union in the event that it is found by the Joint Trade Board hereunder that said contractor has committed any substantial breach of this agreement or has failed to comply with any of the terms or conditions of employment specified hereunder.
>
> Section 13: The Employer, signatory to this agreement, hereby stipulates and agrees that on all work pertaining to our trade, which he obtains in localities outside the jurisdiction of this agreement, he will employ three journeymen who are residents of, or are regularly employed in the area of the job or project for every supervisor, journeyman or apprentice that he employs from his home area or from areas outside of the location of said job or project.

The Company agreed to accept all the other terms of the proposed contract, but refused to accept Sections 12 and 13. The Union, however, throughout the negotiations, insisted that these two provisions must be included in the contract.[3] The Union subsequently contended before the Board that it insisted on Section 12 (the performance bond) because the Company had previously violated the working rules and practices of

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[3] There is no support in the record for the union's assertion (Pet. 4, n. 1) that the "amount of the bond was at all times open for negotiation."

Painters Local 193 at Atlanta, Georgia, in breach of an agreement to conform to such rules. The Company denied that such violations had occurred.[4]

At the final meeting held on May 30, 1959, the Company requested that the expiration date of the contract scheduled to expire on the following day be extended. During the meeting, Johns referred this request to the International for decision. At the same time, Johns asked the Company to submit a counterproposal to Sections 12 and 13. The Company, however, refused to do so until the question of the interim extension of the existing contract was resolved. Subsequently, the International refused permission to extend the contract beyond the May 31 expiration date. Thereupon, no counterproposal to Sections 12 and 13 was made by the Company.

Upon the expiration of the contract, the International directed that work stoppages be called on all the Company's projects. Pursuant to these instructions, petitioner Locals 164, 1287, and 1010 struck the Company's jobs in Jacksonville, Indian River City, and Orlando, Florida.

B. The Board's Conclusions

The Board held that the clauses demanded by the Union did not constitute "wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d) of the Act, so that under *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, insistence thereon as a condition to entering into a contract violated the statutory bargaining obligation

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[4] The Union conceded in the court below that its insistence on Section 13 to the contract could be enjoined as violative of Section 8(b)(3) of the Act. See R. 5, 16-18.

(R. 14-17). The Board ordered the Union, *inter alia*, to cease and desist from insisting on such clauses in collective bargaining negotiations with Cheatham, and, upon request, to bargain collectively with it (R. 22-23).

C. The Decision of the Court of Appeals

The court of appeals, by a divided vote, sustained the Board's conclusion that a performance bond did not fall in the category of "wages, hours, and other terms and conditions of employment," and that hence, under the *Borg-Warner* case, the Union's conduct amounted to a refusal to bargain (Pet. 14).[5] The court noted that its decision was in accord with *National Labor Relations Board* v. *Dalton Tel. Co.*, 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U.S. 824, holding that an employer could not lawfully insist on a contractual provision requiring the union to submit to suit on the contract in the state courts (Pet. 15-16). Judge Edgerton, dissenting, was of the view that a performance bond was within the area of mandatory bargaining under the Act (Pet. 20-21).

ARGUMENT

In *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, the Court held that it is a violation of the Act's bargaining requirements to condition agreement upon subjects which do not constitute "wages, hours, and other terms and conditions of employment." This case presents the narrow question whether a performance bond, insisted upon by the union and payable to it in the event the employer vio-

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[5] The Union consented to the entry of a decree with respect to its insistence on the residence clause (see n. 4, *supra*).

lated the contract, is outside the area of "wages, hours and other terms and conditions of employment" (as the Board and the court below found), or within it (as petitioners contend). We submit that the issue does not warrant review by this Court.

1. As the Board's decision shows (R. 15), this is only the second case in its history (the first to reach the courts)[6] involving a union's insistence on a performance bond. While such bonds have occasionally been included in collective agreements (R. 3, n. 4; 15, n. 4), this establishes no more than that such a clause "is lawful in itself" and "would be enforceable if agreed to." *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 349; see also *id.* at 359, n. 2 (dissenting opinion). The question whether unions may *insist* on such bonds is thus unique and presents no problem of consequence in the administration of the Act.

2. A demand for a performance bond does not fall readily into the phrase "wages, hours, and other terms and conditions of employment."[7] It deals exclusively with sanctions for violations. Unlike grievance and arbitration clauses and other procedural rules for re-

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[6] Although the earlier case, *Teamsters (Conway's Express)*, 87 NLRB 972, 978-979, was the subject of judicial proceedings (195 F. 2d 906 (C.A. 2)), the Board's ruling on the bond issue was not contested.

[7] The most natural reading of the phrase is that it encompasses the terms or conditions under which the employees work. Pensions, union security, and the related subjects mentioned by the dissenting judge (Pet. 18) fall in this category. That the bond in the instant case was removed from the employees' conditions of employment is further shown, as the court below noted (Pet. 14), by the fact that the proceeds were to be "paid *to the union* should the contractor commit any 'substantial breach' of the agreement."

solving disputes over the meaning of an agreement or filling up its interstices, performance bonds do not relate directly or indirectly to any conditions of employment and have not been traditional subjects of collective bargaining. The widespread introduction of such demands into collective bargaining would tend to confine the successful negotiation of collective agreements to parties who are financially responsible, even though the statutory policy is equally applicable to impecunious employers and labor unions.

3. There are opposing considerations which have led to criticism of the entire course of prior decisions on the issues underlying the present case.[8] But the decision below rests squarely upon an established line of National Labor Relations Board precedents holding it to be an unfair labor practice for an employer to insist that a union incorporate or post a performance bond in order to establish its legal responsibility under a collective bargaining agreement.[9] The courts of appeals have generally approved those rulings.[10] This

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[8] See Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1410, note 36 (1958); Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1074-1086, esp. 1080-1081 (1958).

[9] *Jasper Blackburn Products Corp.*, 21 NLRB 1240 (1940); *Scripto Mfg. Co.*, 36 NLRB 411 (1941); *Interstate Steamship Co.*, 36 NLRB 1307 (1941); *Dalton Telephone Co.*, 82 NLRB 1001 (1949); *Standard Generator Service Co.*, 90 NLRB 790 (1950); *I.B.S. Mfg. Co.*, 96 NLRB 1263 (1951); *Cosco Products Co.*, 123 NLRB 766 (1959).

[10] *National Labor Relations Board* v. *Tower Hosiery Mills, Inc.*, 180 F. 2d 701 (C.A. 4), certiorari denied, 340 U.S. 811; *Standard Generator Service Co.* v. *National Labor Relations Board*, 186 F. 2d 606 (C.A. 8); *National Labor Relations Board* v. *Dalton Telephone Co.*, 187 F. 2d 811 (C.A. 5), certiorari denied, 342 U.S. 824; *National Labor Relations Board* v. *Taormina*, 207 F. 2d 251

Court has twice denied certiorari.[11] Furthermore, although Congress, when it revised the Wagner Act, was well aware of the rule that it was an unfair labor practice for an employer to insist upon such a demand, the amendments did not repudiate the Board's decisions.[12]

Under these circumstances, we submit, the narrow question presented by this petition does not warrant further review.

(C.A. 5), petition to adjudge in contempt denied, 244 F. 2d 197 (C.A. 5); *National Labor Relations Board* v. *F.M. Reeves & Sons, Inc.* (C.A. 10), No. 6125, January 19, 1961, 47 LRRM 2480, certiorari denied, 366 U.S. 914. But cf., *National Labor Relations Board* v. *I.B.S. Mfg. Co.*, 210 F. 2d 634 (C.A. 5).

[11] See *Dalton* and *Reeves*, note 10, *supra*.

[12] See H. Rep. No. 245, 80th Cong., 1st Sess., pp. 19-20, Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948), pp. 310-311. See also, S. Rep. No. 105, 80th Cong., 1st Sess., p. 24; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 34-35, Leg. Hist., pp. 430, 538-539.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1961.

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Petitioners,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY OF PETITIONERS TO OPPOSITION BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY OF PETITIONERS TO OPPOSITION BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The brief filed by the NLRB in opposition to this petition for writ of certiorari suggests that this case presents merely a narrow question of law, having little impact in the administration of the National Labor Relations Act or the collective bargaining process. Petitioners assert on the contrary that the issue herein goes to fundamentals in both those areas. The Board's order in the instant case is a negation of the basic principle, expounded by this Court in *NLRB* vs. *National Insurance Company* 343 U.S. 395 and

NLRB vs. *Borg-Warner Corporation* 356, U.S. 342, that the Board shall not intrude itself in the bargaining process or attempt to prescribe for the parties the substantive terms of collective agreements. Performance bond clauses appear in agreements much more than "occasionally" (Board Brief, Page 6); as will be fully demonstrated if this petition is granted, such clauses are common in the construction, garment, textile and other industries and are essential to the maintenance of effective collective bargaining relationships therein. And while the present case may be only the second case involving a union demand for an employer performance bond, or the first to reach the courts, that fact can as well demonstrate acceptance of the issue as a bargainable one so general and for so long a period as to give rise to no challenge until the present one; it in no way detracts from the fact that the performance bond clause does constitute an important substantive term of numerous collective agreements in many industries—a subject matter now threatened with extinction by any employer desiring to oppose secure in the knowledge that the union, if the Board's decision stands, cannot use its traditional economic weapons to obtain the clause or continue it in the future.

The fact that employee performance bond clauses are customarily included in collective agreements goes far in itself to demonstrate that the clause constitutes a term or condition of employment, namely that the employees perform the work required by the agreement under conditions which insure full compliance with the reciprocal obligations of the employer or that they not perform work at all. In this respect, a performance bond clause is like a safe work clause which insures employees that they work under safe conditions if they are to work at all.

2. It is not sound to suggest, as does the Board in its Opposition (Page 7), that widespread demands for a performance bond clause would confine negotiations to the financially responsible employers. Such clauses are presently found most often in industries where marginal employers abound, without such consequences resulting, and

in any event the amount of the bond, as in the present case, can be made dependent on the employer's financial condition.* Surely, it is more consistant with the ultimate purpose of the Act to permit unions to look to such a bond rather than to resort to the disruptive weapon of the strike to obtain compliance.

3. Finally, the fact that there exists a line of Board and court precedent forbidding employer insistence on a union performance bond affords no compelling reason for denying consideration of this petition. To begin with, there appears to be a split in Court of Appeals authority respecting the legality of such employer requests (see *E. G. NLRB* v *IBS Manufacturing Company* 210 F. 2d 634 (C. A. 5), and in view of this Court's further elucidation of the legal principles involved in Borg-Warner, supra, which case was decided after the decisions set forth in Footnote 10 of the Board's Opposition (page 7), there is room for argument that an employer request for a performance bond by the union constitutes at least a bargainable issue (see Footnote 8, Board Opposition, Page 7). Furthermore, none of the court decisions set forth in such Footnote 10 hold, as the Board did here, that the mere insistence on a performance bond was, *per se*, illegal; where the issue was discussed at all, the court merely found that such insistence, taken together with numerous other factors not present in this case, constituted evidence of bad faith bargaining. In any event, entirely different considerations are operative in respect to a union demand that an employee post a performance bond which distinguish that request from a similar request by an employer. An employer has readily available to it many more means of effecting compliance with the contract by the union and the employees involved than does

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*** Contrary to the Board's statement in Footnote 3, page 3 of its Opposition, that there is no support on the record for the union's assertion that the amount of the bond was at all times open for negotiation, petitioners submit that their request for the company's submission of a counter proposal to Section 12 and the employer's refusal to make any such counter proposal (Board Opposition, page 4) constitutes ample such support.**

the union vis-a-vis the employer; among other things the employer is free to immediately discharge "wild catters" or other employees who engage in contract breaches, or, failing that, is usually better able to undertake the expense of litigation.

There is nothing more vital to the collective bargaining process than that it remain free from unchannelled administrative intervention, and nothing more destructive thereof than that traditional and customary substantive provisions of collective agreements be subjected to Board veto or approval absent specific congressional directives.

It is submitted that this case involves an important question in the administration of the Act and of the Board's ability to determine for the parties important substantive terms of collective agreements. The decision of the Board is in direct variance with the decisions of this Court in American National Insurance and Borg-Warner, supra, and warrants review by this Court.

Respectfully submitted,

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